10

Office - Supreme Court, U.S.
FILED
NOV 8 1952
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 317

FRANK A. WHITTINGTON,
Petitioner,

against

MOORE-McCORMACK LINES, INC.,
Respondent.

MOTION FOR LEAVE TO FILE AND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

CHARLES ANDREWS ELLIS and
RICHARD J. McANANY,
Attorneys for Petitioner.

CHARLES ANDREWS ELLIS,
HARRY D. GRAHAM,
RICHARD J. McANANY,
of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 317

FRANK A. WHITTINGTON,

Petitioner,

against

MOORE-McCORMACK LINES, INC.,

Respondent.

MOTION FOR LEAVE TO FILE AND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, FRANK A. WHITTINGTON, respectfully moves for leave to file this petition for rehearing of the order of this Court denying the petition for writ of certiorari herein, entered October 27, 1952.

Grounds for Motion and Reasons for Granting Rehearing and Issuing the Writ

For more than 100 years this Court and other highest Courts have held, in repeated decisions, under common law and statutes alike, that the risks of the employment relationship are risks voluntarily assumed by respectively employer and employee, as allocated between them under the law.

and that the employee is assured freedom as to assumption of any risk by the right at any time to decline to commence or to refuse to continue service (*Tiller* v. *Atlantic Coast Line Railroad Co.*, 318 U. S. 54, 58-62, and cases cited).

This Court, moreover, already has held that the compensation law here involved set aside one body of rules as to risks and their assumption and substituted another, whereby employer and employee, as voluntary coadventurers, assume the risks respectively allotted to them, and whereby the employee assumes the consequence in excess of the scheduled compensation of the risks of employment which had been differently allocated under common law (*New York Central Railroad Co.* v. *White*, 243 U. S. 188, 201, 204, 205), saying: "both parties are responsible, since they voluntarily engage in it as coadventurers, with personal injury as a probable and foreseen result" (p. 205).

Under neither system, however, as heretofore expounded and understood, is it "probable and foreseen" as a risk of the employment, nor does the employee assume either in whole or in part the risk, that his labor will be coerced or that injury will be inflicted upon him as a method adopted to try to coerce his labor. But the decision herein imposes upon him the assumption of this risk.

In the recent campaign candidates stated that there are 62 million workers in the United States who rely upon employment of their services for a living. Millions of them are subject to workmen's compensation laws; other millions to common law with or without other statutory modification. All alike contract and work under the background of the foregoing principles, and under the protective guaranties of the Thirteenth and Fourteenth Amendments against coercion of their labor. To all alike—and to their employers and the latter's insurers as well—the question whether private coercion of labor, and injuries sustained in such coercion, nevertheless are henceforth to be risks of employment assumed in whole or in part by the em-

ployee, is a constitutional, economic and social question of the first magnitude.

While the method of coercion herein was assault (as in *Alden Mills* v. *Pendergraft,* 149 Miss. 595, 602-603; *Barnes* v. *Chrysler Corporation,* DCND Ill., 65 F. Supp. 806, 807) and a workmen's compensation law was pleaded as defense (as in *Barnes* v. *Chrysler Corporation, supra*), this fundamental question would be the same if some different method of coercion and different form of proceeding were involved, and there were no compensation law to plead (e.g., *Shaw* v. *Fisher,* 113 S. C. 287; *Winthrop* v. *Allen,* 122 S. C. 536). In whatever form presented, "The issue is one of grave concern, both to employers and employees" (*Shaw* v. *Fisher, supra,* 113 S. C. at p. 290).

The question is directly presented here by a short record of agreed facts; and the "court could not have reached its judgment without tacitly, if not expressly, deciding the Federal matter" (*Schlemmer* v. *Buffalo, Rochester & Pittsburg Railway Co.,* 205 U. S. 1, 11).

It normally requires several years from injury for a case to reach petition in this Court. If, despite the conflicts on fundamentals shown in the petition, review be withheld by this Court until an identical case involving opposite decision on similar agreed statement reach this Court, the law as to assumed risks as heretofore settled and the Constitutional rights of some 62 million workers—as well as those of their employers and of liability and compensation insurers—will be jeopardized and confused to the irreparable injury of many;—and this petitioner and similarly coerced workers will be irreparably subjected to assumption of a loss which neither the statute nor the Constitution intend they should assume. This Court clearly has power, in its discretion, to reexamine the petition and grant the writ (*Schriber-Schroth Co.* v. *Cleveland Trust Co.,* 305 U. S. 47, 50).

Wherefore, for the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Second Circuit.

Respectfully submitted,

CHARLES ANDREWS ELLIS and
RICHARD J. MCANANY,
Attorneys for Petitioner

CHARLES ANDREWS ELLIS,
HARRY D. GRAHAM,
RICHARD J. MCANANY,
of Counsel.

Certificate of Counsel

I HEREBY CERTIFY that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to ground specified in Rule 33 of the Rules of this Court.

CHARLES ANDREWS ELLIS
Counsel for Petitioner

11

NOV 1[illegible] 1952

HAROLD B. WILLEY, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 317

FRANK A. WHITTINGTON,
Petitioner,

against

MOORE-McCORMACK LINES, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

JOHN P. SMITH,
Attorney for Respondent.

JOHN NIELSEN,
of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 317

FRANK A. WHITTINGTON,
Petitioner,

against

MOORE-McCORMACK LINES, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner presents no grounds for granting this application.

Petitioner presents no intervening circumstances of substantial or controlling effect nor other substantial grounds available to petitioner but not presented previously. (Rule 33, subd. 2, Rules of the Supreme Court.)

Petitioner's present application is but a recapitulation of matters presented in his petition for writ of certiorari.

Wherefore, respondent submits that the petitioner's application for a rehearing of the petition for writ of certiorari should be denied.

Respectfully submitted,

JOHN P. SMITH,
Attorney for Respondent.

JOHN NIELSEN,
of Counsel.